1999

Diana Childs v. William K. Callahan : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DIANA CHILDS, (fka Diane Callahan) Petitioner/Appellant, vs. WILLIAM K. CALLAHAN, Respondent/Appellee.	)	Case No. 990051-CA Priority 15

REPLY BRIEF OF APPELLANT
(Oral Argument Requested)

Appeal from the Judgment of the
Second District Court of
Weber County, State of Utah
THE HONORABLE ROGER S. DUTSON
DISTRICT COURT JUDGE

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REPLY BRIEF OF APPELLANT

The Appellant, Diana Childs, pursuant to Rule 24 of the Utah Rules of Appellate Procedure, submits this Reply to the Brief of Appellee.

ARGUMENT

A CHANGE IN CIRCUMSTANCES WARRANTS A MODIFICATION OF THE DECREE OF DIVORCE IN THIS CASE

In his Brief, Respondent relies solely on the Court's reasoning in Toone v. Toone, 952 P.2d 112 (Utah App. 1998) as a basis for arguing that there is no change of circumstance in this case which would allow the lower court to modify the Decree of Divorce awarding a portion of Respondent's military retirement to Petitioner.

However, the facts of this case are clearly distinguishable from those of Toone in at least three respects.

First, in Toone, the issue of retirement of the Defendant was litigated in the lower court. Although the lower court did not specify whether or not its award to the Plaintiff included military retirement, it is clear that the issue of retirement was dealt with. Id. at 113. In this present case, the issue of retirement, military or otherwise, was not dealt with at all in the lower court.

Second, in Toone the Decree of Divorce was entered after the passage of the Uniformed Services Former Spouse's Protection Act (USFSPA). In this case, the Decree of Divorce was entered before the passage of the Act; before Congress granted any right in the marital asset to the class of people which included Petitioner. While Throckmorton v. Throckmorton, 767 P.2d 121 (Utah App. 1988) may state that a change in the law does not constitute a material change of circumstances, Toone is still significantly distinguishable because the Plaintiff in Toone had a right which she could have asserted and didn't at the trial on the matter, whereas after McCarty (and before the USFSPA) Petitioner herein did not have a right to any portion of her spouse's military retirement which she could have asserted at the time of her divorce trial. In fact, the "gap" provision of USFSPA was included in the legislation for the specific purpose of correcting inequities such as the one in this case.

Third, and most importantly, in Toone at the time of the divorce trial the Defendant had already earned his military retirement. Id. at 113. In this present case, the Respondent had not yet earned his military retirement at the time of the trial. At the time of the divorce, Respondent had only thirteen years of creditable military service and no foreseeable liklihood of achieving a military retirement. Under federal law, service members are not eligible to receive military retirements until they have accrued twenty years of creditable service. Therefore, at the time of the divorce in this matter, Respondent was not likely to ever receive a military retirement so there was nothing for the parties to divide.

Moreover, in 1985, when the parties herein returned to court, there was no mention in Respondent's financial declaration that he had any type of military pay which would have alerted the Petitioner to the fact that Respondent had re-affiliated with the military and might, then, be accruing points toward his retirement.

However, subsequent to the Decree of Divorce in this case, the Respondent has apparently reached at least twenty years of creditable service, thus triggering his right to receive a military retirement the majority of which is based on service performed during the marriage.[1] This, standing alone, is a "substantial change of circumstances" which allows the court to modify the Decree and award a portion of Respondent's military retirement to Petitioner.

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[1]Due to the summary disposition of the petition by the trial court, Petitioner was unable to verify the accrual of the retirement benefit through discovery.

If the Court applies the Toone precedent to the facts of this case it will be establishing a means whereby a person such as Respondent herein, who has accrued a substantial right toward a retirement, can deprive a spouse of his or her marital share of that retirement by temporarily terminating the employment from which the retirement derives. Since there would be no reasonable liklihood of the retirement vesting, the trial court would not award a portion of the "potential asset" to the non-participant spouse. The participant spouse could then resume his or her employment after the divorce and take the entire retirement.

The fact that a retirement may not have vested to Respondent at the time of the divorce, but does subsequently vest in him, should not deprive Petitioner of her share of the retirement which was earned during the marriage.

THE APPELLEE SHOULD NOT BE AWARDED ATTORNEY'S FEES

Respondent requests attorney's fees on the grounds that the Petitioner's appeal is frivolous. Such a claim should be denied. Rule 33(b) of the Utah Rules of Appellate Procedure defines a frivolous appeal as one which "is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify or reverse existing law." In O'Brien v. Rush, 744 P.2d 306, 310 (Utah App. 1987), the Court stated that "For purposes of Rule 33(a) of the Rules of the Utah Court of Appeals we define a 'frivolous appeal' as one having no reasonable legal or factual basis as defined in Rule 40(a)."

The Court of Appeals has further refined its approach to the award of attorney's fees on appeal in Taylor v. Hansen, 958 P.2d 923, 931 (Utah App. 1998) where it stated that

"we impose sanctions only in egregious cases, lest there be an improper chilling of the right to appeal erroneous lower court cases." Porco v. Porco, 752 P.2d 365, 369 (defining egregious cases as those in which appeal is "obviously without any merit" and "taken with no reasonable liklihood of prevailing.")

In this case, there was both factual and legal basis for the appeal.

CONCLUSION

The denial of military retirement benefits in Toone was clearly appropriate to the facts of that case. To reach the same conclusion in this case would, however, require the Court to broaden the application of that holding to facts and legal issues that are substantially different from those presented in Toone. Petitioner herein has shown substantially changed circumstances in addition to the change in the federal law controlling military retirements and, unlike Mrs. Toone, she does fit into the class of persons that Congress intended to receive the benefits of the "gap" provision of USFSPA. Although Respondent's entitlement to the retirement was not perfected until after the parties' divorce, the majority of the rights to that benefit accrued during the 13 years of active duty which were served during the marriage. Petitioner requests only her share of that marital portion of the retirement. To deny her that share would result in the unjust enrichment of Respondent at Petitioner's expense.

DATED this 8th day of September, 1999.

NEIL B. CRIST & ASSOCIATES
Attorneys for Appellant

By: _____
NEIL B. CRIST
LEONARD E. McGEE

CERTIFICATE OF MAILING

I certify that I mailed two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to the following individual at the address shown, via first-class mail, postage prepaid on this 8th day of September, 1999:

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